Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

BRIAN SEAN MCCLENDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 21, 2010

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QUESTIONS PRESENTED FOR REVIEW

A. A Circuit Court Errs in Affirming Admission of a Defendant's Statements to Law Enforcement that were Involuntarily and the Result of Coercion.

B. A Circuit Court Errs in Affirming the Exclusion of a Defense Investigator from the Courtroom During Trial when the Investigator's Presence was Essential to the Defense.

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The decision of the U.S. Court of Appeals for the Sixth Circuit, United States v. Brian Sean McClendon, No. 08-5155 (6th Cir., Jan. 25, 2010), affirming the district court, was unreported. App. 1a. The district court judgment order, United States v. Brian Sean McClendon, No. 3:06-CR-00114 (W.D. Ky., Jan. 28, 2008), was also unreported. App. 18a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231, as the government charged Brian Sean McClendon with criminal offenses against the laws of the United States. The Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the district court entered a final judgment and Mr. McClendon timely appealed from it. This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit has rendered a final decision on direct appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> "[N]o person" "shall be compelled in any criminal case to be a witness against himself."

U.S. Const. Amend. V.

> Exclusion of Witnesses:
>
> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make

> the order of its own motion. The rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Fed. R. Evid. 615.

STATEMENT OF THE CASE

The Grand Jury for the U.S. District Court for the Western District of Kentucky returned a superceding indictment against Defendant-Appellant Brian Sean McClendon, charging him with two Hobbs Act violations, two counts of using, carrying and brandishing a firearm during a crime of violence, and conspiracy to possess with intent to distribute 500 grams or more of cocaine.

McClendon moved to suppress his statements on the ground that law enforcement had illegally obtained an involuntary statement as a result of coercion. Despite McClendon being in custody for six hours, being questioned for two hours, and despite law enforcement officer statements suggesting promises of leniency to McClendon, the district court denied the motion.

During trial, McClendon asked the district court for leave to allow his investigator to be exempted from the sequestration order and to remain in the courtroom during the testimony of witnesses. McClendon argued that the investigator's presence was crucial to the

defense in part because he had interviewed several of the government witnesses and would be able to provide insight into cross-examination and inconsistencies. The district court denied the motion.

The jury acquitted McClendon of a Hobbs Act charge and both firearm charges. The jury found him guilty of one Hobbs Act charge and the cocaine conspiracy.

In the Sixth Circuit, Mr. McClendon noted the district court had erred in failing to suppress his statements in excluding the investigator. The Sixth Circuit affirmed.

McClendon is currently incarcerated.

ARGUMENT ADDRESSING REASONS FOR ALLOWING THE WRIT

A. The Sixth Circuit Erred in Affirming the District Court's Admission of Mr. McClendon's Involuntary and Coerced Statements.

Under Supreme Court Rule 10, the Court will review a decision of a U.S. court of appeals if it conflicts with relevant decisions of the Court. Sup. Ct. R. 10(c). In this case, the Sixth Circuit's decision conflicts with this Court's holdings in Mayle v. Felix, 545 U.S. 644, 661, 125 S. Ct. 2562 (2005), and Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515 (1986), as the totality of the circumstances demonstrated that law enforcement's interrogation techniques, including lengthy questioning, coercion, and suggestions of leniency, led McClendon to make

involuntary statements. For these reasons, as further addressed below, McClendon asks the Court to grant his petition.

1. Confessions Must be Voluntary and Not the Result of Law Enforcement Coercion or Implied Promises, however Slight

The Self-incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amend. V. That clause and the Due Process Clause of the Fourteenth Amendment require "that a confession be voluntary to be admitted into evidence." Dickerson v. United States, 530 U.S. 428, 433, 120 S. Ct. 2326 (2000).

Convictions based upon evidence of involuntary confessions cannot stand. Rogers v. Richmond, 365 U.S. 534, 540, 81 S. Ct. 735 (1961). This is in part because methods used to elicit involuntary confessions offend the underlying principle that in our criminal justice system, the government "must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Id. at 540-41 (citing, inter alia, Blackburn v. Alabama, 361 U.S. 199, 206-07, 80 S. Ct. 274 (1960), and Spano v. New York, 360 U.S. 315, 320-21, 79 S. Ct. 1202 (1959)). These convictions also must be vacated because "'a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation." Michigan v. Tucker, 417 U.S. 433, 448, n. 23, 94 S. Ct. 2357 (1974) (quoting

Escobedo v. Illinois, 378 U.S. 478, 488-89, 84 S. Ct. 1758 (1964)).

The dispositive question in an adjudication of a self-incrimination claim based upon an custodial police interrogation is whether the defendant answered voluntarily or were his statements coerced. Mayle, 545 U.S. at 661. "[T]he determination [as to] whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation." Fare v. Michael C., 442 U.S. 707, 724, 99 S. Ct. 2560 (1979).

Those circumstances include the crucial element of police coercion, Connelly, 479 U.S. at 167, the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153-54, 64 S. Ct. 921 (1944), its continuity, Leyra v. Denno, 347 U.S. 556, 561, 74 S. Ct. 716 (1954), the defendant's maturity, Haley v. Ohio, 332 U.S. 596, 599-601, 68 S. Ct. 302 (1948) (opinion of Douglas, J.); the defendant's education, Clewis v. Texas, 386 U.S. 707, 712, 87 S. Ct. 1338 (1967); the defendant's physical condition, Greenwald v. Wisconsin, 390 U.S. 519, 520-21, 88 S. Ct. 1152 (1968) (per curiam); the defendant's mental health, Fikes v. Alabama, 352 U.S. 191, 196, 77 S. Ct. 281 (1957); and deprivation of food or sleep. Reck v. Pate, 367 U.S. 433, 441-42, 81 S. Ct. 1541 (1961).

To be admissible, a confession must be free and voluntary and not "obtained by any direct or implied promises, however slight." Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347, 83 S. Ct. 448 (1963). Evidence procured through false promises is just as involuntary as evidence obtained by official physical or

psychological coercion. Id. The Court has recognized that "interrogators have turned to more subtle forms of psychological persuasion," resulting in greater emphasis being placed upon the defendant's mental circumstances when determining the voluntariness aspect of a confession. Colorado, 479 U.S. at 164.

2. The District Court and Sixth Circuit Erred in Finding that McClendon's Admissions—Made Only After Coercion and Statements Concerning Leniency—were Voluntary.

The totality of circumstances demonstrated that McClendon's statements concerning drug activities were involuntary. His statements were made only as the result of a prolonged period of custody, a lengthy period of interrogation, lack of food and water, law enforcement's suggested (but false) promises of lenience and pressure upon McClendon to speak immediately.

A detective testified that he advised McClendon that he faced a very long time in prison, and suggested that McClendon provide information in a confidential informant capacity to assist the government in unrelated cases and investigations, as this type of information could lead to a more lenient sentence and that time was of the essence. The detective stressed that if McClendon wished to provide information he should do so quickly because, after he was imprisoned, his information would not be as valuable to the United States and the offer of leniency may no longer exist or at a minimum his bargaining position would be weakened.

The length of the interrogation was an important factor in this case. The agents spent six hours with McClendon in their custody and interrogated him for two hours. The detective repeatedly accused McClendon of being involved and was confrontational. McClendon went without food and water for the entire six hours. Thus, the detective was coercive, making accusations, and then discussed leniency. Only after these statements did McClendon state that he was aware of drug transactions involving two hundred kilograms of cocaine and one thousand pounds of marijuana.

During the suppression hearing, the government attempted to elicit testimony that McClendon made the statements regarding drugs before any offers of leniency were made. But the earlier recorded statement taken from McClendon contains no information about the drug transactions. Accordingly, the statements regarding drug activities were not volunteered, but were given as result of the detective's threats followed by the offer of leniency.

Although the district court made a finding of fact as to the lack of promise of lenience, suggestions of lenience, however slight, can improperly motivate a defendant to speak. See Shotwell Mfg. Co., 371 U.S. at 347-48. Moreover, voluntariness is a question of law reviewed de novo. See Ornelas v. United States, 517 U.S. 690, 696-97, 116 S. Ct. 1657 (1996). Even without a "promise," the detective's accusations and threats, followed by suggestions of leniency and pressure to speak immediately impacted the voluntariness of McClendon's statements.

In short, the detective's threats of imprisonment, coupled with the information regarding the options for leniency, the totality of the circumstances surrounding McClendon's statement concerning drug trafficking demonstrate that the statement was not freely and voluntarily given. The lower courts erred in finding that the government met its burden in showing that McClendon's statement was voluntarily rather than coerced. Under Mayle and Connelly, the totality of the circumstances showed that McClendon's admissions were not voluntary, and his statements should have been suppressed. Thus, the Sixth Circuit's decision to affirm the district court conflicts with those cases, and McClendon asks the Court to grant certiorari.

B. The Sixth Circuit Erred in Affirming the District Court's Exclusion of Mr. McClendon's Investigator from the Courtroom During Trial, as the Investigator's Presence was Essential to the Defense.

Under Supreme Court Rule 10, the Court will review a ruling of a U.S. court of appeals if that ruling "has decided an important question of federal law that had not been, but should be, settled by this Court." Sup. Ct. R. 10(a). In this case, the Sixth Circuit has affirmed a district court decision that excluded McClendon's investigator from the courtroom during trial on the conclusion the investigator was not essential to the defense. This Court has not addressed the limits of Fed. R. Evid. 615(3). Also under Rule 10, the Court will review a decision of a U.S. court of appeals if it conflicts with a ruling from another circuit court on the same important matter. Sup. Ct. R. 10(a). Although certainly not clear, it appears that the Sixth

Circuit's approach in this case falls outside the approach taken by the other circuits as to Rule 615(3).

1. Federal Rule of Evidence 615(3)

Under the federal rules, "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." Fed. R. Evid. 615. Rule 615 codified a well-established common law tradition of sequestering witnesses "as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615, Advisory Committee Notes. That rule does not authorize the exclusion of four categories of persons, including "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Fed. R. Evid. 615(3). Judge Weinstein recognizes that this exception to Rule 615 is most frequently invoked in the case of expert witnesses but observes that it may apply any time a party demonstrates the witness "is essential" to the party's case. 3 WEINSTEIN'S EVIDENCE ¶ 615(01) at 615-9 (1976).

2. Other Circuits' Approaches to Excusing Defense Witnesses from the Sequestration Rule.

The circuit courts have infrequently addressed Rule 615(3) as it applies to parties asking to excuse witnesses from the sequestration rule. In United States v. Olofson, 563 F.3d 652 (7th Cir. 2009), the defendant sought exemption from the sequestration rule for his firearms expert during the testimony of the government's expert on the same topic. The Seventh Circuit rejected the argument that just because Rule

703 contemplates that an expert can render an opinion based upon facts made known at trial does not therefore exempt the expert from sequestration. Id. at 660. The Seventh Circuit also found that simply because appellant told the district court he "would like to have" the expert present was not a showing that the expert was "essential" to the appellant's case. Id. at 610-11.

In United States v. Klaphake, 64 F.3d 435 (3rd Cir. 1995), the district court refused to exempt his accountant and tax return preparer from the sequestration order, finding the defendant failed to show it was essential that the expert remain in the courtroom during trial to assist his counsel in presenting a defense. The Third Circuit affirmed; but in doing so it expressly noted the problem that the accountant was going to be called both as an expert to deliver an opinion and as a fact witness. Id. at 437. See also United States v. Agnes, 753 F.2d 293, 306-07 (3rd Cir. 1985) (affirming district court denial of exemption from sequestration rule for defendant's investigator who also happened to be defendant's girlfriend).

In United States v. Conners, 894 F.2d 987 (8th Cir. 1990), it was the government seeking to use Fed. R. 615(3) to allow an expert to remain in the courtroom in addition to the case agent. The government argued that the witness "was called as an expert in the area of bank examination and that his presence during the trial was essential to his ability to effectively testify regarding the exhibits before the jury." Id. at 991. The district court allowed the expert to be excluded from the sequestration order, and the Eighth Circuit affirmed. Id.

In United States v. Seschillie, 310 F.3d 1208 (9th Cir. 2002), the district court had excluded the defendant's criminologist, who was to testify only as an expert, from the courtroom following his testimony. The Ninth Circuit found error, concluding the defendant had shown the criminologist was essential to the defense. Id. at 1214:

> Unlike an expert excluded because he is both an expert witness and a fact witness, [the criminologist] was not a fact witness. These circumstances favor allowing [the criminologist] to observe trial [before entering an opinion].

Id. See also United States v. Lach, No. 94-50109, 1995 U.S. App. LEXIS 6064, at *10 (9th Cir., Mar. 23, 1995) (noting approvingly that district court had explicitly ruled defendant's accounting experts were permitted to remain in courtroom during testimony of government's experts).

3. United States v. Ortiz

In United States v. Ortiz, 10 F. Supp. 2d 1058 (N.D.Ia. 1998), the defendant argued her investigator was "essential" to the presentation of her cause. Id. at 1064. Excluding the investigator would have prevented her from responding to testimony of witnesses in court with a prompt investigation and contrary testimony. Id. Moreover, the investigator had "intimate knowledge of the facts" such that defense counsel could not effectively function in the investigator's absence, and the investigator would have been unable to present essential testimony without hearing the trial testimony of other witnesses, or at least learning about

that testimony, such that he could perform his investigative duties. Id. at 1065.

A defendant's girlfriend or someone else with a natural bias or tendency to modify testimony to comport with other witnesses is not someone that would be permitted to appear for the entire trial and then also testify. See id. at 1063. But much like a case agent, an "investigator's only interest in the case is a professional one," even if that investigator is hired for the defense. Id. For these reasons, the district court allowed the investigator to be present under Rule 615(3). Id. at 1067-68.

4. McClendon's Request under Rule 615(3)

During trial, McClendon asked the district court for leave to allow his investigator to be exempted from the sequestration order and to remain in the courtroom during the testimony of witnesses. McClendon argued that the investigator's presence was crucial to the defense in part because he had interviewed several of the government witnesses and would be able to provide insight into cross-examination and inconsistencies.

The investigator had no blood relation to McClendon, and the district court had the option of specifically warning the investigator not to use testimony heard to change his own testimony. McClendon had an investigator interview witnesses and knew the facts of their claims much better than the attorneys and was in a position of telling the attorneys possible avenues of cross-examination. The investigator was also in a position to act immediately,

based on what he heard at trial, with new assignments without having to be told to do so at the end of the day.

McClendon noted that during the course of the trial in his case, the government's attorney had whispered to the case agent (the detective), and that agent had left the room to investigate aspects of the case. Obviously, McClendon was unable to do that and could not have that power without an investigator in the courtroom. Thus, the presence of his investigator would have leveled the playing field.

5. The Sixth Circuit's Opinion Below

Despite these arguments, the district court denied the request, and the Sixth Circuit affirmed. The Sixth Circuit's opinion appeared to fall outside the sphere of logic from the cases cited above.

Although the Seventh Circuit in Olofson affirmed the district court finding that the expert was not "essential," it did so because the appellant failed to advance any legitimate grounds in the district court. Olofson, 563 F.3d at 610-11. Although the Third Circuit in Klaphake affirmed the district court's finding that a witness was not essential, that court was concerned that the witness was going to testify as both an expert and as a fact witness. Klaphake, 64 F.3d at 437. The same worry was not present here, as McClendon's investigator was expected to testify only as to impeachment, not as an expert.

In Conners, the Eighth Circuit ruled just as McClendon had asked the district court and Sixth Circuit to rule in his case. Much like the government argued in Conners, McClendon argued that the

presence of his investigator was essential to effectively responding the testimony of each of the several witnesses the investigator had interviewed. See Conners, 894 F.2d at 991.

The Ninth Circuit in Seschillie ruled as McClendon had asked the district court and Sixth Circuit to rule in his case. Unlike an expert excluded because he is both an expert witness and a fact witness, McClendon's private investigator was not also going to testify as an expert. See Seschillie, 310 F.3d at 1214. Instead, he was only going to be called to impeach testimony inconsistent with what the witnesses told the investigator previously.

6. Conclusion

In sum, Rule 615(3) recognizes an exception to the sequestration rule when the presence of a witness is shown to be essential to the party's case, even when that witness is not testifying as an expert. Fed. R. Evid. 615(3). Case law from the circuit courts outside the Sixth Circuit, along with a district court out of Iowa, suggest that in a case where a defendant's investigator will not be testifying as both a fact and expert witness, and when the investigator provides a unique perspective not also held by the attorney or defendant, an exception should be made. In this case, however, the district court refused to allow the investigator be present, and the Sixth Circuit affirmed. This Court has not addresses this issue, which is an important matter for trials and criminal defense. For these reasons, McClendon asks the Court to grant his petition.

CONCLUSION

Defendant-Petitioner Brian Sean McClendon submits that his petition for writ should be granted for the compelling reasons noted above, and respectfully asks the Court to certify these issues for full briefing or remand the matter to the Sixth Circuit.

Dated: 21 April 2010

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 10a0041n.06

No. 08-5155

[Filed January 25, 2010]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
Brian Sean McClendon,	)
	)
Defendant-Appellant,	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: MERRITT, MOORE, and GIBBONS, Circuit Judges.

MERRITT, Circuit Judge. Brian McClendon had previously worked at a Wal-Mart in Louisville, Kentucky. McClendon was convicted for offenses

related to his role in the robbery of an armored car guard at the Wal-Mart store and a subsequent drug conspiracy funded by the fruits of that robbery. He appeals his conviction and sentence on grounds of insufficient evidence and the unreasonableness of his sentence in addition to certain trial errors. We find all of his arguments without merit and AFFIRM his conviction and sentence.

I. FACTUAL BACKGROUND

On March 20, 2006, an armed guard employed by AT Systems was leaving a Wal-Mart in Louisville, Kentucky, when he was robbed at gunpoint by two men. Police arrested three men in connection with the robbery: Brian McClendon, Marcus Capers and Marc Hill. Both Hill and Capers cooperated with police and claimed that McClendon was the mastermind behind the robbery. The testimony of Hill and Capers – in connection with surveillance footage and phone records – constituted the majority of proof offered against McClendon. At trial, Capers and Hill testified as to their roles in the robbery. They provided much of the information about the planning and execution of the robbery and drug conspiracy. Their testimony taken together alleges the following events.

McClendon was the first to suggest robbing the Wal-Mart, and McClendon determined all of the details of the robbery including the best date and time. Capers and McClendon alone went to the Wal-Mart on March 13, 2006, allegedly for the purpose of robbing it on that date. However, McClendon called off the robbery after waiting for the armored guard to arrive. He claimed that he did not feel right about it and that they would return at another time. McClendon

believed that they needed a third party to help. Consequently, when McClendon saw Hill at the Wal-Mart days before the robbery, he attempted to convince Hill "to do something for him," but did not at that time explain that he was recruiting Hill to help rob the Wal-Mart. The plan was for McClendon to enter the store first to serve as a look-out and inform Capers and Hill – who were to wait outside the store – when to enter. The men were to communicate via cell phone.

On March 20, 2006, Capers and McClendon, arriving in separate cars, met Hill at a gas station near the Wal-Mart. Capers was driving his girlfriend's car, and he switched the car's license plate with a stolen license plate. At this time, Capers informed Hill of the robbery plan. Hill testified that he initially expressed reluctance to participate but later agreed after urging from McClendon. Capers and Hill then drove Capers' girlfriend's car to the Wal-Mart and waited at the side of the store, while McClendon drove separately to the Wal-Mart. The men all waited for two to three hours for the armored car to arrive. Capers testified that he had two cell phones with him that day and that he and Hill communicated by phone with McClendon throughout this waiting period.

Upon seeing the armored car pull into the restaurant parking lot adjacent to the Wal-Mart, McClendon called Capers and Hill to inform them that the armored car was about to arrive at Wal-Mart. Once the armored car arrived, McClendon entered the Wal-Mart store and continued to talk to Capers on the phone. He informed them that they should get out of the car and wait at the Wal-Mart shopping cart chute. Wal-Mart employee Kirby Brewer testified to noticing

Capers and Hill before the robbery standing outside the cart chute. Brewer also noticed that Capers was talking on the phone during this time.

During this period, Edward Bell, the armored car guard, entered the Wal-Mart and went into the cash office of the store. He made his delivery and picked up several bags of cash and checks. Still on the phone with Capers, McClendon informed him that the guard was coming out of the cash office. Thereafter, Capers and Hill entered the store by running through the store's cart chute and robbed Bell at gunpoint. Capers testified that prior to the robbery he placed his cell phone in his pocket, but did not hang up on McClendon. Capers stated that McClendon was still on the phone line during the entire robbery. After fleeing the store, Capers informed McClendon that they had made it across the street and were en route to the Ford plant, the group's prearranged meeting location for after the robbery. McClendon remained in the store for the duration of the robbery. Following the completion of the robbery, he purchased some shirts and pants and left the store.

Capers and Hill drove to the Ford plant to meet McClendon. The pair discarded the clothes they wore during the robbery, moved the cash into a new bag, discarded all of the checks, and took the stolen license plate off the car. McClendon arrived shortly thereafter, and the three men drove in McClendon's car to a local mall where McClendon gave the other two men money to buy a change of clothes. After leaving the mall, the three went back to McClendon's house and counted the cash. Capers recalled the count being $42,000, while Hill testified that they counted $40,000 in cash.

Capers testified that after the robbery, he and McClendon and McClendon's girlfriend Stacy drove to Toledo, Ohio, and Detroit, Michigan, where they purchased one kilogram of cocaine and twenty pounds of marijuana with the money from the robbery. He asserted that this had been McClendon's intention all along, so that they might increase their gain from the robbery. After arriving into Detroit, McClendon directed Capers to drive to a specific house, and McClendon entered the house. Capers testified that McClendon came out of the house with cocaine wrapped in aluminum foil. Capers also stated that when they returned to Louisville, he noticed about thirty pounds of marijuana in the car. Capers believed that McClendon must have placed the marijuana in the car while Capers was asleep at their motel.

Thereafter, police conducted an investigation, which eventually led to the arrest of Capers and Hill on March 23, 2006. Capers and Hill chose to cooperate with police and provided details of the robbery. Police corroborated Capers and Hill's information with Wal-Mart video surveillance footage and phone records. For instance, police believed that a person inside the store must have alerted Capers and Hill as to the most opportune moment to enter and rob the guard. Only certain places in the store provided the vantage point necessary to see the guard. Images from the surveillance tape revealed that McClendon was in the store with a vantage point where he could see the guard.

Additionally, every surveillance image of McClendon showed him talking on a cell phone. Police took these images in conjunction with Capers' cell phone records, which showed that sixteen phone calls

were made between Capers' 619-0720 number and a 767-0496 number. The records for these phones showed that there were calls made between the phones immediately before, during and after the robbery. Capers testified that 767-0496 was the phone number that McClendon was using on the date of the robbery. The 767-0496 number was listed in the name of Angelia Musulin, but she told police that she had never purchased a phone with this number. Musulin stated that she knew McClendon, had worked with him, and had been a babysitter for his children a few times. Police also relied on letters sent from McClendon to Angelia Musulin to tie McClendon to this phone. The letters urged Musulin to claim that she owned the cell phone number 767-0496.

Detective Larry Duncan arrested McClendon on August 22, 2006, pursuant to an arrest warrant. Detective Duncan read McClendon his rights and then transported him to police headquarters. McClendon waived his rights and was interrogated by Duncan and FBI Special Agent Greg Ahlers. After being confronted with the surveillance images, he admitted to being in the Wal-Mart that day, but he denied being involved in the robbery. He claimed all phone calls between himself and Capers concerned a trip to Detroit that the pair planned on taking. McClendon admitted to driving with Capers to Detroit, and once there, purchasing one kilogram of cocaine and twenty pounds of marijuana.

A federal grand jury charged McClendon with the following five offenses: interference with interstate commerce by threats or violence related to an attempted robbery of Wal-Mart on March 13, 2006, in violation of the Hobbs Act codified in 18 U.S.C.

§ 951(a) ("attempted robbery charge"); using and carrying a firearm during the attempted robbery charge, in violation of 18 U.S.C. § 924(c)(1)(A); interference with interstate commerce by threats or violence related to the completed robbery of Wal-Mart on March 20, 2006, in violation of the Hobbs Act codified in 18 U.S.C. § 1951(a) ("completed robbery charge"); aiding and abetting the using, carrying, or brandishing of a firearm during completed robbery charge, in violation of 18 U.S.C. § 924 (c)(1)(A); conspiring to possess with intent to distribute 500 or more grams of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B)(ii) ("drug conspiracy charge"); and two forfeiture counts. After a trial on these charges, a jury convicted McClendon of the completed robbery charge and the drug conspiracy charge and acquitted him of all other charges. The District Court sentenced McClendon to 240 months of imprisonment on the completed robbery charge and 360 months of imprisonment for the drug conspiracy charge, with the terms of imprisonment to run concurrently. The District Court also entered a restitution order against McClendon, jointly and severally with Capers and Hill, in the amount of $76,068.65. McClendon timely appealed.

After the initial appellate briefing in this case, McClendon obtained new counsel who moved to strike his original brief. This request was denied, but this Court provided McClendon's new counsel the opportunity to supplement McClendon's original brief. Both McClendon and the Government have since filed supplemental briefs for this Court's consideration. This opinion addresses all claims made from both the original and supplemental briefs.

II. ANALYSIS

1. Sufficiency of the Evidence

McClendon claims that his convictions were based on insufficient evidence. This Court reviews the sufficiency of the evidence to support a conviction by viewing the evidence in the light most favorable to the prosecution and determining whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). While "more than just a scintilla" of evidence is required to sustain a conviction, circumstantial evidence alone is sufficient. *See United States v. Sherlin*, 67 F.3d 1208, 1214 (6th Cir. 1995); *see also United States v. Vincent*, 20 F.3d 229, 233 (6th Cir. 1994). McClendon's burden "is very heavy because the reviewing court does not judge the credibility of witnesses or weigh evidence, and it draws all reasonable inferences in the governments's favor." *United States v. Ostrander*, 411 F.3d 684, 691 (6th Cir. 2005). Further, "the uncorroborated testimony of an accomplice may support a conviction under federal law." *Sherlin*, 67 F.3d at 1214 (quoting *United States v. Gallo*, 763 F.2d 1504, 1518 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986)).

The Robbery Charge

The jury convicted McClendon of a violation of the Hobbs Act for his participation in the robbery. The Government must prove two elements to prevail on a Hobbs Act charge: "(1) interference with interstate commerce (2) in the course of a substantive criminal act." *Ostrander*, 411 F.3d at 691. First, robbing a business satisfies the first element of the Hobbs

charge, so long as there is an effect on interstate commerce. *Id.* A national corporation such as Wal-Mart has an effect on interstate commerce. Second, the statute names robbery as a substantive criminal act, thus satisfying the second element of the Hobbs charge. *See* 18 U.S.C. § 1951(a). Statements made by Capers and Hill implicating McClendon in the robbery would alone be sufficient to support his conviction. But their testimony is further corroborated by circumstantial evidence such as the phone records, the Wal-Mart surveillance video, and the letters McClendon sent to Angelia Musulin encouraging her to lie for him.

McClendon takes issue with the credibility of Capers and Hill, but we must ordinarily defer to the credibility determinations made by the jury where there is conflicting testimony. *See United States v. Jefferson*, 149 F.3d 444, 445 (6th Cir. 1998). The same is true concerning the credibility of Danielle Smith, Capers' girlfriend, who testified at trial to incriminating statements made by McClendon concerning the robbery.

Finally, McClendon contends that the prosecution presented no evidence tying him to the cell phone records in question. Both Capers and Hill testified at trial that this was the phone number that they used to communicate with McClendon both prior to and during the robbery. Further, this was the number that McClendon asked Angelia Musulin to claim as her own. McClendon had no reason to request this of Musulin if he had no connection to that phone number. In sum, there was sufficient evidence for a rational jury to convict McClendon of the robbery.

The Drug Conspiracy Charge

The jury convicted McClendon for conspiring to possess with intent to distribute 500 grams or more of cocaine. McClendon's primary argument regarding his drug conviction is that Capers' testimony alone is not sufficient evidence to uphold his conviction. As noted above, the uncorroborated testimony of Capers is enough to support McClendon's conviction. In addition, McClendon himself admitted in his post-arrest interview to traveling to Detroit to purchase drugs. Given the evidence presented against McClendon, a rational juror could have found the essential elements of the drug conspiracy charge beyond a reasonable doubt.

2. Reasonableness of the Sentence

McClendon next argues that his sentence was unreasonable pointing both to the amount of restitution and the term of imprisonment imposed. This Court reviews a sentence for both substantive and procedural reasonableness under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Likewise, the amount of restitution is evaluated under this same standard. *United States v. Johnson*, 440 F.3d 832, 849 (6th Cir. 2006).

Criminal History Weighed Too Heavily

First, McClendon argues that his sentence was substantively unreasonable because the imposition of a 360 month sentence for the drug conspiracy charge conflicts with the sentencing mandate of 18 U.S.C. § 3553(a). A sentence is substantively unreasonable "when the district court selects a sentence arbitrarily,

bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Conatser*, 514 F.3d 508, 519-20 (6th Cir. 2008), *cert. denied* – U.S. –, 129 S.Ct. 450 (2008). There is a presumption of reasonableness when a sentence falls within the guidelines range. *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006). McClendon contends that his sentence violates the purposes of 18 U.S.C. § 3553(a) because the District Court allegedly gave greater weight to his prior criminal history than any other factor under the statute. *See* 18 U.S.C. § 3553(a) (articulating factors that District Court should weigh when sentencing a defendant). He asserts that the District Court considered his criminal history four times when calculating his Guidelines range: "first with the increased statutory range, second with the career offender finding, third with the *increased* career offender offense level of 37 because the maximum sentence for the increased statutory range was life, and fourth with the increase of the criminal history category to VI." (Supplemental Br. of Appellant at 29.)(emphasis in original). But, McClendon also admits that his 360-month sentence is permissible under the Guidelines. Further, each of the enhancements that McClendon complains about are permissible under the Guidelines.

Having reviewed the presentence report on which the District Court relied and the sentencing hearing transcript, we find that the sentence rendered against McClendon was substantively reasonable. The District Court emphasized McClendon's criminal history, but also relied heavily on the seriousness of the crime and the "need to protect the public and promote respect for

the law." (Transcript of Sentencing Hearing at 28.) The District Court evaluated and weighted the § 3553(a) factors appropriately when sentencing McClendon, and thus, his sentence is not substantively unreasonable.

Amount of Restitution

McClendon next contends that his sentence was unreasonable because the District Court improperly calculated the restitution order imposed against him. While this Court normally reviews a restitution order under an abuse of discretion standard, McClendon did not object to the amount of restitution at sentencing. Therefore, we review the District Court's order for plain error. McClendon seizes upon the fact that more than twenty-three thousand of the restitution amount was derived from checks.

Wal-Mart representative Robert Mangold testified that Wal-Mart's loss was $52,149.13 in cash and $23,919.02 in checks for a total of $76,085.65.[1] McClendon argues that it was procedurally unreasonable for the District Court to calculate restitution based on the amount of the checks because the government presented no evidence as to whether the checks were endorsed to or by Wal-Mart, whether the checks were used by McClendon or another party, or whether any of the money associated with the checks was recovered by Wal-Mart. He also notes that Capers and Hill each testified that the bounty received from the robbery was approximately $40,000. For support, McClendon directs us to *United States v.*

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[1] The record is unclear as to the$.50 disparity between the sum of the cash and check amounts and the restitution assessed.

Dunn, 300 F. App'x 336 (6th Cir. 2008), where this court struck down a sentence which impermissibly included interest when calculating loss to the victim for sentencing guidelines purposes.

This issue is distinguishable from *Dunn* because it involves a factual dispute over the amount of loss to the victim, not a procedural determination of loss calculation as in *Dunn*. Based on Wal-Mart's records and Mangold's testimony that the "pickup deposit report" indicated that $23,919.02 in checks had been stolen from the guard, the District Court did not plainly err in finding that amount had been lost by Wal-Mart in addition to the cash. The $40,000 bounty alleged by Capers and Hill was significantly less than the cash amount alone and was thus properly ignored by the Court in calculating the full amount for restitution.

3. *Motion to Suppress McClendon's Statement to Police*

McClendon claims that his post-arrest statements were involuntary because Detective Duncan coerced him into making them. He argues that the District Court erred by refusing to suppress these statements. McClendon argues that the total time of the questioning in conjunction with promises of leniency render the statements involuntary. Promises of leniency may be coercive when coupled with threats of imprisonment or prosecution. *See Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991); *see also United States v. Johnson*, 351 F.3d 254, 261-62 (6th Cir. 2003) (finding that "promises of leniency may be coercive if they are broken or illusory.") McClendon was in police custody for six hours and questioned for two of those

hours. He did not consume food or drink during that time, but the record reflects that he never requested any. Detective Duncan informed McClendon of his *Miranda* rights at the time of arrest. Later, McClendon signed a waiver of rights form after reading the rights out loud. McClendon made the following statement at the end of his interrogation:

> Um, I would like to add the fact that, uh, Mr. Duncan has been truthful to me from the beginning ... Um, also I want to add the fact that this investigation was to my satisfaction. It-It ...it's not, I was not forced to tell anything. I was not forced to say anything. I was not coerced to nothing; never did I take a break – a 15-minute break to over-think things. We've talked straight through this. Um, I'm not gonna maintain a innocence or a guilt right now because that would just be stupid. But at the same time I just want to thank....on the record, I just want to thank Mr. Duncan and his partner uh, for the respect that they've shown me. Thank you.

(Government's Response to Def.'s Motion to Suppress Statement at 5-6.) Moreover, the record evidence does not support a conclusion that the District Court clearly erred in finding that "there was no promise of leniency." Supplemental Hr'g Tr. Vol. 2 at 173. Reviewing the totality of the circumstances, we conclude that McClendon's statements were voluntarily given, and the District Court did not err when refusing to suppress them.

4. Exclusion of Private Investigator from the Courtroom

McClendon next argues that the District Court abused its discretion by excluding his private investigator from the courtroom during the trial. Federal Rule of Evidence 615 allows a court to exclude witnesses from the courtroom "so that they cannot hear the testimony of other witnesses." Fed. R. Evid. 615. In addition to exempting a party from being sequestered, this rule does not authorize exclusion of "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Fed. Rule Evid. 615(3).

After the District Court instituted "the rule" and sequestered all witnesses for the trial, McClendon asked the Court for leave to allow his investigator to be exempted and allowed to remain in the courtroom. McClendon's counsel informed the Court that the investigator was not an expert, but instead was providing impeachment and background information. Following reflection on the issue, the District Court denied this request, instead choosing to provide McClendon's counsel with frequent breaks to discuss the case with the investigator and allow the investigator to obtain transcripts from the other witnesses. McClendon claims that these modifications were insufficient because the investigator interviewed several government witnesses and could provide immediate insight to their cross-examinations if allowed to remain in the courtroom. We find that the District Court's modifications allowed McClendon's investigator to participate significantly in his defense and that the investigator's presence was not "essential." These frequent breaks provided ample

opportunity for the private investigator to assist McClendon's counsel. Additionally, the Court gave the investigator materials, such as access to the transcripts of witness testimony, that allowed him to aid defense counsel in the impeachment of witnesses and strategic defense planning. The District Court acted appropriately within its discretion. The decision to exclude the private investigator, and instead provide other modifications, did not prejudice McClendon's right to a fair trial.

5. *Court's Response to Jury Question*

Finally, McClendon claims that the District Court erred by failing to properly respond to a jury question. During deliberations, the jury submitted a question as to who had been identified as having the telephone number ending in 7086. McClendon claims that the District Court responded by making a "general reference to the previous instruction that the jury rely upon its recollection of the testimony." (Appellant's Supplemental Br. at 25.) According to McClendon, this response did not satisfy the Court's obligation to resolve jury questions "with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989).

However, the cited "concrete accuracy" language concerns questions of law, *Nunez*, 889 F.2d at 1569, whereas this case involves a question of fact. When the jury submits a factual question, instructing the jury to rely on its own recollection of the testimony is proper and "carefully preserve[s] the province of the jury while minimizing any prejudice to the defense or the prosecution." *United States v. Blanks*, No. 91-6084,

1992 WL 120205, at *2 (6th Cir. June 2, 1992)(per curiam); *See also Ramonez v. Berghuis*, 490 F.3d 482, 489 n. 7 (6th Cir. 2007). Moreover, McClendon notes that Detective Duncan "had testified at trial that he did not know whose phone number ended in 7086." (Appellant's Supplemental Br. at 25.) Thus, the answer to the jury's question was apparently not contained in the record, making it unclear what else the Court could have told the jury.

V. CONCLUSION

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN District of KENTUCKY

Case Number: 3:06-CR-114-1-C
USM Number: 10038-033

[Dated January 25, 2008]

UNITED STATES OF AMERICA)
)
V.)
)
BRIAN SEAN McCLENDON)
)

JUDGMENT IN A CRIMINAL CASE

Keith Kamenish
Defendant's Attorney

THE DEFENDANT:

* * *

X was found guilty on count(s) 3S & 5S
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
18 USC § 1951(a) and 2	Interference with Commerce by Threat or Violence and Aiding and Abetting Same	03-20-06	3
21 USC § 841(a)	Possession with Intent to Distribute 500 grams or more of Cocaine	03-20-06	5S

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 1, 2 & 4 of the superseding indictment

X Count(s) original indictment X is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

IT IS FURTHER ORDERED that the presentence report be returned to the United States Probation Office, and shall be available to counsel on appeal. **IT IS FURTHER ORDERED** that the sentencing recommendation be returned to the United States Probation Office, and shall not be available to counsel on appeal.

January 22, 2008
Date of Imposition of Judgment

/s/ Jennifer B. Coffman
Signature of Judge

Jennifer B. Coffman, U.S. District Judge
Name and Title of Judge

1/25/08
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 240 MONTHS ON COUNT 3 AND 360 MONTHS ON COUNT 5, TO BE SERVED CONCURRENTLY, FOR A TOTAL TERM OF 360 MONTHS. The defendant shall not be designated to the facility with Marcus Capers, 3:06-CR-77-1, and 3:06-CR-77, or Marc Edward Hill, 3:06-CR-077-2. Defendant Marc Edward Hill (3:06-CR-077-2) should have first choice/priority of designated facility.

X The court makes the following recommendations to the Bureau of Prisons:

That the defendant participate in the intensive drug education and treatment program.

X The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 YEARS ON COUNT 3 AND 5 YEARS ON COUNT 5, TO BE SERVED CONCURRENTLY, FOR A TOTAL TERM OF 5 YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

* * *

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

* * *

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a substance abuse treatment program and shall submit to periodic drug and alcohol testing at the direction and discretion of the probation officer during the term of supervision.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall be prohibited from incurring any new credit charges or opening any additional lines of credit without approval of the probation officer unless she is in compliance with the payment schedule.

Pursuant to Public Law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, the defendant shall submit to DNA collection if the offense of conviction is a felony.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ -0-	$76,068.65

* * *

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
A T Systems, Inc. 1050 South 9th Street Louisville, KY 40203	$76,068.65	$76,068.65	

* * *

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the ☐ fine X restitution.

* * *

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 76,268.65 due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

* * *

F X Special instructions regarding the payment of criminal monetary penalties:

Payments to be made to: United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY, 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney. Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on

earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of $60 based on earnings from a job in Federal Prison Industries and/or community resources during the period of incarceration to commence upon arrival at the designated facility. Upon commencement of the term of supervised release the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval the court. Within the first 60 days of release, the probation office shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total

Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Marcus Capers, 3:06-CR-77-1, $76,068.65
Marc Edward Hill, 3:06-CR-77-2, $76,068.65

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.